Supreme Court, U.S.
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No. 92-91

In The

Supreme Court of the United States

October Term, 1992

GERRY D. DICKENS,

Petitioner,

v.

UNITED PARCEL SERVICE, INC., JOHN MALDONADO AND C. E. ROARKE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In deciding an appeal from the second trial of a cause, the court of appeals referred – in a footnote of its unpublished opinion – to one fact in the record from the first trial. Does this mere reference require a remand to that court for reconsideration, even though its judgment was based on undisputed facts in the record from the second trial?

LIST OF PARTIES

The parties are those listed on the cover.

The parent corporation of United Parcel Service, Inc. is United Parcel Service of America, Inc.

United Parcel Service, Inc. has no non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

I. Procedural History

Dickens filed suit in Texas state court for false arrest, malicious prosecution, intentional infliction of emotional distress, and violations of his civil rights under 42 U.S.C. § 1983 (1988). 3 R. 210-11. Based on the federal claim, the defendants removed the case to federal court. 3 R. 204. A first trial ended in a mistrial. 8 R. 638. At the second trial, the jury returned a verdict in favor of Dickens on all theories. 2 R. 302-05. The judgment awarded Dickens attorneys' fees, $400,000 in actual damages, and $6,000,000 in punitive damages. 1 R. 661.

This appeal followed. 1 R. 593. In an unpublished opinion, the United States Court of Appeals for the Fifth Circuit reversed the judgment, holding that Dickens had failed to prove the absence of probable cause, which was a necessary element of each of his causes of action. The Fifth Circuit dismissed his case. Dickens then petitioned for rehearing. After his petition was denied, Dickens moved for leave to petition for rehearing en banc out of time, moved for an emergency stay, and moved to recuse the panel that had decided the cause for bias and prejudice. Dickens's counsel attached his own affidavit to support his allegations of bias and prejudice. The Fifth Circuit denied his motions, noting especially that the motion to recuse was "frivolous." Dickens subsequently filed his petition for writ of certiorari.

II. Statement of Facts

UPS's Westpark Facility in Houston had been suffering an unusual number of lost packages; by the fall of

1985, these losses totalled approximately $150,000. 12 R. 61. The Loss Prevention and Delivery Information Department of UPS decided to investigate these losses. 10 R. 12; 12 R. 66. Its investigation discovered a pattern to the losses: most involved C.O.D. packages containing gold jewelry, which were addressed to 7500 Bellaire (Sharpstown Mall) in Houston. 12 R. 19, 33, 61. The investigation resorted to "salt" packages in an effort to determine where in the UPS system the losses were occurring. 12 R. 63-64. The salt packages proved the UPS drivers were not involved in the thefts. *Id.* Instead, traces placed on these salt packages proved unequivocally that the thefts were occurring at the pre-loading dock, 12 R. 64-65, where Dickens worked. 10 R. 17, 24-25.

UPS began its investigation at the loading dock with a hidden camera, but it revealed nothing. 10 R. 162; 12 R. 86. UPS next began hiding security personnel in vehicles to watch the loading area. 10 R. 96-97; 12 R. 66, 70, 204. This effort proved likewise ineffective, presumably because the guilty employees surmised they were being watched. 12 R. 72, 87. John Maldonado, a member of the Loss Prevention Department, 10 R. 144; 12 R. 98, and Officer Curtis Roarke, Jr., an off-duty Houston policeman, 10 R. 88, set up a new surveillance position approximately 130 feet from the UPS loading dock. 10 R. 102; 12 R. 106, 145. At this position, they hid behind a steel door and drilled holes about the size of a dime through which to peer. 10 R. 99, 103, 164-65, 171-72; 12 R. 106, 112, 154, 168-69.

On November 5, 1985, Maldonado and Roarke arrived at their surveillance position at 4:30 a.m. 10 R. 94, 101, 117. Between 7:00 and 8:30 a.m., they observed

Dickens in the loading dock area. 10 R. 187-88, 190-91, 194-96, 201, 204, 207; 11 R. 150; 12 R. 72, 83, 107, 114, 170. Maldonado had seen Dickens about 20 times during his employment at UPS and immediately recognized him. 12 R. 111-12, 130. Six trailers (one 40-foot and five 28-foot) were at the loading dock and five more trailers were along its side. Plaintiff's Ex. M; 10 R. 102; 12 R. 174. Dickens was checking the trailers to see whether all packages had been removed, and he was removing plastic wrapping from the building behind the loading dock and the trailers. 10 R. 37-38, 40, 104, 201; 11 R. 101, 103-05, 139, 141, 146-49; 12 R. 108, 129, 146, 183.

On Dickens's third or fourth trip from the building that morning, Maldonado and Roarke observed a package being kicked out of a loading dock door. 10 R. 104, 110-11, 123, 131, 133, 205-06; 12 R. 108, 120, 130, 136, 179. Dickens immediately emerged from the door, picked up the package, wrapped it in plastic, and took it behind the 40-foot trailer at the loading dock. 10 R. 104, 205-07; 11 R. 105; 12 R. 108, 130, 147. Dickens then appeared from behind that trailer without the package. 10 R. 196, 207; 12 R. 146. Dickens next proceeded to close the other trailers, 10 R. 196, 207, and reentered the building. 12 R. 108-09. Dickens returned to retrieve the package he had placed in the 40-foot trailer. 11 R. 106, 141, 146; 12 R. 109, 147-48. Dickens then put that package in an adjacent empty trailer, shut the door, and left the UPS premises for the day. 10 R. 121, 197-98; 11 R. 106, 146; 12 R. 109, 147-48.

A short time afterwards, former UPS employee Scooter Williams appeared at the loading dock. 10 R. 23, 156, 211, 213; 11 R. 124; 12 R. 109. Scooter was recognized by Maldonado, because they had engaged in several

altercations in the past, 10 R. 155; 11 R. 96-97; also, Scooter was known as a flashy dresser who wore a large amount of gold jewelry. 11 R. 155. Dickens had known Scooter since the seventh grade, 11 R. 155, and Scooter had been a co-worker with Dickens at UPS, 11 R. 96, 138. In addition, they had been high school classmates and teammates on the track team. 11 R. 95. Scooter's father had even been Dickens's agent when he had tried to play professional football. 11 R. 155.

Maldonado and Roarke first observed Scooter lying underneath the trailer where Dickens had placed the package. 10 R. 211, 213; 12 R. 109, 149. Scooter arose, looked furtively left and right, opened the door, reached inside the trailer, and removed a package. 10 R. 113; 12 R. 109, 150.

As Maldonado and Roarke came forward, Scooter saw them, dropped the package, and fled in his red Corvette, 12 R. 74-75, 109, 112, despite Roarke's yelling, "Stop, police!" 12 R. 150. The package Scooter dropped was addressed to 7500 Bellaire (Sharpstown Mall) and contained gold jewelry. 12 R. 24, 33, 114-15, 153. Another package containing gold jewelry (and addressed to a jewelry store) was found in the trailer. 12 R. 23-24, 33, 114-15, 153. The two packages together contained jewelry valued at approximately $2,000 [illegible]2 R. 25.

Suspecting a theft ring, Maldonado and Roarke reviewed the situation with UPS supervisors and waited until the next morning before questioning the UPS employees in the pre-loading area. 10 R. 228; 12 R. 75-76, 118. They questioned several employees and then questioned Dickens. 10 R. 43, 123, 176-77, 228; 12 R. 77, 119-20,

156. Dickens's answers were found to be less than convincing: he said his job was to clean out the trailers, 11 R. 101-03, but he had been observed – and admitted – placing a package inside a trailer, 11 R. 106, 146; 12 R. 109, 147-48; the trailer was supposed to be empty when he placed the package in it, 12 R. 181, but a package remained in the trailer after Scooter removed one, 12 R. 23, 112-13, 153; and, he said that the package he had placed in the trailer was empty, 11 R. 105, 142-43, 146; 12 R. 120, even though the package found in the trailer contained gold jewelry, 12 R. 24, 153. Dickens was therefore arrested by Roarke and another Houston police officer and escorted off the premises in handcuffs. 10 R. 45, 136; 11 R. 114-15; 12 R. 121, 157.

While being booked at the police station, Dickens received a telephone call from Scooter, who had already obtained an attorney for Dickens. 11 R. 118, 161-63; 12 R. 159. Dickens spent approximately 13 hours at the police station before posting bail. 11 R. 119.

An Assistant District Attorney reviewed the evidence and decided to prosecute Dickens for second degree felony theft. 11 R. 120; 12 R. 188-90. A Harris County Grand Jury indicted Dickens. 12 R. 187-88, 191; Plaintiff's Ex. X. The District Attorney who prepared the case for trial thought the case was "win[n]able," 12 R. 190; however, at his subsequent trial, Dickens was acquitted. 10 R. 111, 127, 199; 11 R. 126; 12 R. 178, 197. But after the incident on November 5, 1985, losses at the Westpark Facility "stopped drastically." 12 R. 30.

Dickens then filed this civil lawsuit, alleging the absence of probable cause for his arrest. 3 R. 210, 212. At

trial, Judge Kenneth Hoyt permitted Dickens to introduce, over the defendants' objections, 2 R. 317-20, 324-25; 9 R. 26-30; 11 R. 29, needless and inflammatory "expert" testimony from an optometrist. 11 R. 57-81. This $1000-a-day expert, 11 R. 60, opined that Maldonado (despite his 20/15 vision, 12 R. 112) and Roarke (despite his 20/20 corrected vision, 10 R. 117) could not have identified Dickens from their surveillance post. 11 R. 64, 66, 78. The expert testified that people become harder to identify at a distance and in the shade, that it is difficult to identify a black person (such as Dickens) in the shade, and that blacks all look alike to whites (such as Maldonado and Roarke). 11 R. 62, 67, 72, 76.

Nevertheless, *Dickens himself admitted* that he performed every act that the witnesses said they saw him do and upon which they based their belief that he was involved in criminal activity. 11 R. 105-06, 139-43. Notwithstanding Dickens's admissions, the jury awarded Dickens $400,000 in intangible actual damages and $6,000,000 in punitive damages. 2 R. 305. The Fifth Circuit reversed, and Dickens filed his petition for a writ of certiorari. He seeks only a remand to that court for reconsideration. Pet. at 24.

REASONS FOR DENYING THE WRIT

I. Dickens Has Demonstrated No Compelling Reason To Review this Case

Dickens's sole complaint is that one reference to a fact in the record from the first trial, but not in the record from the second trial, requires the Supreme Court to

devote its resources to remand this cause for reconsideration by the Fifth Circuit. Dickens's complaint is frivolous and deserves to be sanctioned.

The opinion of the Fifth Circuit is unpublished. It is not published expressly because this case "has no precedential value" and was decided "on the basis of well-settled principles of law." Op. at 2 (quoting 5th Cir. Loc. R. 47.5). The particular reference of which Dickens complains is contained in footnote 4 to that opinion. The footnote was not material to the court's decision.

Dickens seeks to compare the reference to the record from the first trial to a law clerk's visiting the scene of an accident without the litigants' knowledge. Pet. at 19. But the record from the first trial was that of an adversary proceeding, fully available to both parties. Indeed, the fact referenced by the Fifth Circuit was elicited by Dickens's own counsel on cross-examination. *See* Pet. at App. C – 2-4.

The Fifth Circuit's footnote sought only to correct yet another misrepresentation by Dickens's counsel that had occurred during oral argument. As the court noted, during oral argument Dickens's counsel had "maliciously mischaracterized Mr. Maldonado in the following manner:

> When you read the record about Maldonado what you are going to find is that Maldonado's one of these guys that was run out of the and [sic] I don't speak factually, but, ah, but sort of ah [sic] my belief here, was that Maldonado was a character who was run out of the criminal justice system, his type was run out of the criminal justice system when *Miranda* rights and

> things like that came into place and he's popped up again in private surveillance.

In fact, the record reflects that Maldonado was a UPS employee that worked his way up through the ranks and had never applied for any law enforcement position other than simply inquiring about employment as a Houston reserve police officer." Op. at 6 n.2.

It was against this background that an exacerbated Fifth Circuit added the footnote of which Dickens complains. But Dickens has not been completely candid with this Court about the reason for that footnote. A complete reading of the entire footnote makes this clear:

> Again, counsel for plaintiff-appellee attempts to mischaracterize the evidence. He suggests at oral argument that Scooter Williams was well known at UPS as driving a Red Corvette and that it is incredible that he fled the scene at 8:00 a.m. in the middle of a shift change without being observed. In fact, the record demonstrates that while employed by UPS, Scooter drove a Mercedes Benz 190 sedan and therefore that is the type of car which he would be known as driving by Westpark facility personnel. Further the record shows that the Corvette in which he escaped was parked in an adjacent lot, and that this activity occurred at around 10:00 a.m., fully two hours after the loading crew had departed for the day.

Op. at 9 n.4.

Several conclusions contrary to Dickens's contentions become apparent when one reads the footnote of which he complains in its entirety.

- First, the primary misrepresentation of the record by Dickens's counsel that the Fifth Circuit is correcting is the assertion that Scooter fled the scene in the middle of a shift change. The record established without dispute that the attempted theft occurred long after all workers would have left the area; thus, it was not surprising that no one other than Maldonado and Roarke observed Scooter.

- Second, the reference to Scooter's Mercedes from the first trial, if anything, was helpful to Dickens's position in this appeal: it could have raised a question about whether the respondents had correctly identified Scooter since he usually drove a Mercedes, but this day was seen in a red Corvette. Dickens never asserted this potential discrepancy, presumably because the record from the second trial independently proved Scooter was well-known for also driving a red Corvette. 11 R. 158-59.

- And third, the Fifth Circuit recognizes in this footnote that Scooter was observed making his escape in the red Corvette. Dickens does not challenge the accuracy of this fact in this Court.

The text of the entire footnote establishes that the Fifth Circuit is basing its decision on the presence of Scooter's red Corvette, not his Mercedes. Thus, contrary to the picture Dickens paints for this Court, the Fifth Circuit based its decision solely on the record from the second trial, which Dickens concedes was the proper record on appeal. Dickens can show no reason why the Supreme Court should review this case.

II. The Fifth Circuit Relied on Undisputed Facts from the Record of the Second Trial

The principal question presented by this appeal was whether Dickens proved the absence of probable cause for his arrest. " 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' " *Brinegar v. United States*, 338 U.S. 160, 175 (1948) (quoting *McCarthy v. De Armit*, 99 Pa. 63, 69). To prove the absence of probable cause, Dickens was required to show that the defendants had no reasonable ground whatsoever to believe that he was guilty of a crime at the time of his arrest. *See, e.g., Moran Util. Co. v. Childs*, 392 S.W.2d 536, 538 (Tex. Civ. App. – Beaumont 1965, writ ref'd n.r.e.).

The Supreme Court has recognized that under these long-prevailing standards consideration is given to protecting citizens from unfounded charges while also recognizing the counterbalancing goal of enforcing the law for the community's protection. *Brinegar*, 338 U.S. at 176. "The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement." *Id.* If the "beyond a reasonable doubt" standard required for finding guilt were applied in determining probable cause for an arrest, one would rarely be able to effectively protect the public interest by enforcing the law. *Id.* at 174; *see also Diamond Shamrock Corp. v. Ortiz*, 753 S.W.2d 238, 241 (Tex. App. – Corpus Christi 1988, writ denied) ("public policy requires that there be wide latitude in reporting facts to prosecuting authorities in order that the exposure of crime not be discouraged"); *Thomas v. Cisneros*, 596

S.W.2d 313, 317 (Tex. Civ. App. – Austin 1980, writ ref'd n.r.e.).

As the court of appeals held, the *undisputed* evidence at trial established that any reasonable person, presented with the information the defendants possessed, would have instantly concluded that a crime had occurred and that Dickens was probably involved in criminal activity.

At the time of Dickens's arrest, the defendants indisputably knew that in the preceding several months, the Westpark facility had experienced an exceptional number of stolen packages, the majority of which contained gold jewelry and were addressed to 7500 Bellaire, a shopping mall. 10 R. 18; 12 R. 19, 61. UPS had conducted an extensive investigation, which concluded that the packages were being stolen during the pre-loading stage in the morning. 12 R. 62-65.

As a pre-loader at the Westpark facility, Dickens was assigned to check the trailers to see that all packages had been removed. 11 R. 101. Dickens admits – and Maldonado and Roarke observed – that while "checking" the trailers in that area that morning: he picked up a package, placed it behind one trailer, later retrieved that package, and placed it inside another trailer. 11 R. 101, 103-05, 139-43; 12 R. 107-09, 146-48. Dickens admitted, and Maldonado and Roarke observed, that he then completed his shift and left the facility. 11 R. 106; 12 R. 109, 149.

A short time later, Maldonado and Roarke observed Scooter Williams (a former UPS employee known to wear gold jewelry) underneath the trailer in which Dickens had placed the package. Scooter arose, looked suspiciously left and right, opened the trailer door, and

removed a package. 12 R. 109, 149-50. As Maldonado and Roarke left their surveillance position, Scooter dropped the package and fled in his red Corvette as Roarke shouted, "Stop, police!" 12 R. 109-10, 112, 150-51.

Maldonado and Roarke returned to the trailer and found another package as well. 12 R. 23-24, 112-13, 153. The package Scooter dropped was addressed to 7500 Bellaire (Sharpstown Mall); the one remaining in the trailer was addressed to a jewelry store. Plaintiff's Ex. E. Both packages contained gold jewelry. 12 R. 24-25, 33, 35, 153. On the following morning, Dickens was given the opportunity to exculpate himself, but gave a physically impossible story: when he put the package in the trailer both the trailer and the package were empty. 11 R. 105, 142-43, 146-50; 12 R. 120.

The above undisputed facts – which *were* in the record from the second trial before the Fifth Circuit – established a reasonable ground for believing that Dickens was involved in criminal activity. Because Dickens failed to negate the existence of probable cause, the Fifth Circuit correctly reversed the district court's judgment.

CONCLUSION

In basketball parlance, when there is no harm, there is no foul. Dickens's counsel invited the footnote reference to Scooter's Mercedes from the record of the first trial. That reference was in no way material to the court's decision; the Fifth Circuit based its decision on other,

undisputed facts that were indisputably in the record on appeal.

As Dickens himself says, "[t]here can be no serious contention that the petitioner lost a right secured by the federal rules." Pet. at 21. Nor is due process implicated. The Supreme Court should deny the writ. The respondents also ask for all other relief to which this Court may find them entitled.

Respectfully submitted,

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